In the

SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1900.

Henry Lockhart,
Plaintiff in error,
vs.
J. A. Johnson, Julia A. Johnson, his wife; Charles Pillsbury & Co.,
Defendants in Error.

In error to the Supreme Court of the Territory of New Mexico.

BRIEF OF DEFENDANTS IN ERROR.

WM. B. CHILDERS,
Attorney for Defendants in Error.

No 147.

SUPREME COURT

OF THE

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OCTOBER TERM, 1900.

Henry Lockhart,
Plaintiff in error.

vs.

J. A. Johnson, Julia A. Johnson, Charles Pilkey, the Unknown Heirs of Lee Walker, deceased, Wm. B. Childers, Edward W. Dobson, Charles Bonsall, and the Washington Gold & Silver Mining Company.
Defendants in Error.

NO ASSIGNMENT OF ERRORS IN THE RECORD

The plaintiff in error has not annexed to the writ of error any assignment of errors. Neither is there any specification of errors in the brief. It is true he has copied into the brief the assignment of errors filed in the Territorial Supreme Court on the hearing of the

cause on writ of error in that Court, but that is not the equivalent of the assignment of errors required by the statute, and the rules of this Court. Counsel for plaintiff in error should therefore not be heard, under the rule. A motion to dismiss might well have been made by defendants in error. Not having made such a motion, however, defendants in error submit to the Court the determination of the question whether or not the Court will proceed to hear counsel, and examine the record without such compliance with the statute and the rules. This Court has very plainly announced that under such circumstances it will not examine a case and dismissed it, without a motion to dismiss being filed.

Benites vs. Hampton, 123 U. S. 519.

STATEMENT AND BRIEF FOR DEFENDANT IN ERORR.

This is a suit in ejectment, and was originally brought by the plaintiff in error as plaintiff below against James Q. Wills, H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, Charles Pilkey, Samuel Dunlop, Lee Walker, William B. Childers, Edward W. Dobson, and Charles Bonsall, Receiver, By death of parties, Lee Walker and Samuel Dunlop, and transfer of other interests in the property. The case was finally decided in the Supreme Court of New Mexico with the parties defendant as stated in the above entitling of the cause.

The suit was brought to recover possession of a mining claim called the "Sampson." The case was tried in the District Court for Bernalillo County and

taken to the Territorial Supreme Court by writ of error, and the judgment upon the first hearing was reversed. A motion for rehearing was then filed and allowed. The plaintiff in error's statement that this motion for rehearing in the Supreme Court "was not considered until a change of Federal Administration had resulted in a complete change in the personnel of the Court, when the motion for rehearing was allowed and the case again heard, the former decision reversed and the decree of the trial court affirmed," while it is immaterial, is not a correct statement of the facts. The motion for rehearing was allowed by the same court which rendered the first decision and before there had been a single change in its personnel.

Record, pg. 273.

Plaintiff in error's statement of facts sets out a part of a contract entered into by the plaintiff with the defendant Pilkey, and one Ben. Johnson. This contract is very remarkable in several particulars which plaintiff fails to set out. By reference to the evidence and to the terms of the contract, it will be observed that it was made specially with reference to one mining claim, called the Mammoth, which had already been discovered by Pilkey. (Record, pg. 14.) The whole consideration relates to that one claim, and all the tools, powder, fuse, etc., to be furnished under the contract by the plaintiff in error and Ben. Johnson to Pilkey were to be furnished and used on that one claim. (Record, pgs. 41, 42, 43, 45.) The contract provides: "*It shall be at the option of said second parties* (plaintiff in error) *to continue working or abandon any claim located at any time they deem proper.*"

(Record 45.) It also provides that any "*concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties* (plaintiff in error) *shall work a forfeiture of any right or interests direct or indirect that such first party might have or afterwards obtain to and for the benefit of the said second parties.*" These features of the contract may become important in the consideration of the evidence in some aspects of the case.

On the 10th of July, 1893, the defendant Pilkey posted a mining location, in the usual form, describing a mining claim 1500 by 600 feet, by reference to monuments of stones, and posted the same in a pile of rocks twelve or fourteen inches high, against a pine tree. The evidence clearly shows that the only monument referred to in the notice, which was ever put on the claim, was that in which the notice was posted. The plaintiff testified as follows:

Q. At the time you speak of, when this copy of the notice was handed to you by Pilkey, what had Pilkey done or what was he doing with reference to the lead described in the notice?

A. He had put up a monument of stone referred to, location notice, but at that time he had done no work on the claim.

Q, That was the latter part of August or the first of September?

A. About the first of September.

Q. State what, if anything, was said between you and him with reference to complying with the mining laws or regulations as to sinking a hold and recording this location notice and marking the boundaries.

A. I had previously written him distinctly in regard to (interrupted)—

Q. Never mind about what you had written him. At this time state what passed between you and him on that occasion.

A. I called his attention to the necessity of locating the claims properly and doing the work within the specified time; we examined the ground, picked it over and broke some of the rock, and he in answer to my suggestion in regard to the necessity of doing the work in time, stated specifically in regard to that claim that he knew of a soft place on it where leads cropped up and he could get a 10-foot hole down from the top of the ledge with very little work.

Q. And what with reference to doing it before October 10th?

(Objection as leading.)

Q. Please state all that Pilkey said on that occasion with reference to complying with the requirements of the law and to this claim within the time required by law.

A. He said he would have the work done all right in time.

Q. What work?

A. I do not pretend to give his exact language because I do not remember, I give the substance of our understanding in regard to those matters.

Q. That is enough: That he would have what work done in time?

A. The location work.

Q. Was anything said as between you and him as to what work was required to be done?

A. I do not know that there was at that time for the reason that I had explicitly stated to him prior to that time the necessary work and matters to be attended to in connection with the proper location of the mining claim.

Q. Do you mean in that letter of August 11th, 1893, which you have produced here?

A. I do.

Q. Well, in stating that he would have the work done all right to what did he refer if you know?

Objection as leading, and that the witness should

state what was said.

The court tells the witness to state the language as near as he can that was used.

A. In referance to the work the conversation took place on the Sampson claim and all talk with reference to work or anything else that occurred referred to that claim, and I distinctly recollect from the fact that I anticipated it would take considerable time in September, if not nearly the entire time to complete the work mapped out on the Ellen L., he would have very little time to do the work on the Sampson and I desired to impress on his mind that that work would have to be done prior to the time of the expiration of the location notice. That brought up his statement in regard to having found a place on the claim where he could do the work so readily.

Q. You say that you went up and down the lead, yourself, Pilkey and Deidrick; what lead do you refer to?

A. The Sampson lead.

Q. Did you go over its whole length?

A. I did.

* * * * * * * * * *

Q. Were you up there afterwards, after the first of September, whilst Pilkey was still in possession?

A. Not while he was in possession for us.

* * * * * * * * * *

Q Please state what you saw else upon this claim with reference to appropriation or possession of it.

A. Well, as to that question I will say, I didn't see any corner stakes. (Record, pages 22, 23, 24.)

From the plaintiff's own testimony it will be seen that the only possession up to the first of September, 1893, that Pilkey had ever taken of the claim, was to place a location notice in this pile of stones; no other monuments were placed upon the claim and no work was done. Plaintiff states that he never saw the claim after the first of September, until several weeks after

a location notice was posted upon the claim in the name of F. Fagaly, Lee Walker, H. C. Leeds and J. Johnson, which notice was posted on the 23d day of October, 1893, and possession taken under the same. It is under this last location that the defendants in error claim.

Plaintiff in error next visited the claim in March or February, 1894, after the locators, under whom the defendants in error claim, had located the claim and done a very considerable amount of work thereon, shipping a car-load of ore from it, etc. He distinctly states that he was only there about the first of September, 1893, and that the location monument, blazed tree and prospecting work was all the evidences of possession which he saw. In his testimony he says :

Q. How much prospecting work did you see and where was it ?

A. I said it was on the ledge or lead.

Q. How much of work of that kind was done, please describe that.

A. We, there was considerable of it where a man had gone along over the lead where float was and broken pieces of rock and picked around and exposed the character of the quartz.

Q. Broken off pieces of rock then?

A. Yes, sir; and removed from their original resting place.

Q. There was no holes of any kind sunk on the claim at that time?

A. No, sir; not that I know of.

Q. That was the extent of the work you saw done?

A. Yes, sir.

Q. That work, which you call prospecting work, and this monument and blaze on the tree and this location notice was all the evidence of possession you saw there ?

A. Yes, sir; except Mr. Pilkey, he was an evidence of possession.

Q. Yes, but he went away when you went away; he went off the claim when you went away.

A. I understand he is there still.

Q. I am not asking you about that; you know that is not in answer to my question. Was Mr. Pilkey on that claim residing or living there or simply went up there to show it to you and then returned to his cabin when you went back?

A. Mr. Pilkey was not living on the claim, and after we had gone over the claim we returned to the cabin with Mr. Pilkey. When we left there we left Mr. Pilkey on the Ellen L. claim.

(Record, page 66.)

Pilkey's testimony on the question of possession is as follows; after testifying that the plaintiff received a copy of the location notice when he visited the claim, about September 1st, he says:

Q. Is that a copy of the one you put on the claim?

A. Yes, sir; it is.

Q. Where was the location notice posted on the claim?

A. Why, it was not posted; it was a little pile of rocks throwed up that way and stuck in so it would not blow away and a large rock put over it to keep it from getting wet; I expect a dozen rocks or so of the ledge rock. Mr. Lockhart was there and I showed him and told him the location is in that monument. He never saw it on the tree; there never was one on the tree.

Q. Did he look at it?

A. No, sir; he didn't care; not of my knowledge; I was there present all the time.

Q. What was done to this tree?

A. Well, there was nothing done to the tree more than it had the bark knocked off it. I didn't. I know the turpentine had run down on the place where it was barked.

Q. What monument, if any,—in the first place describe that monument in which the location notice was posted.

A. It was laid up agin, it was built agin the tree—where there was a little trail, a trail that went up the ridge and close to this tree, built right beside that, and it was well nigh over a dozen rocks, small ones. (Witness illustrates with his hands) and this (the location notice in his hands) was put in that monument.

Q. What other monument did you erect on that claim?

A. No other, sir; that is all the work I have ever done on it under this location notice or any other.

Q. What other work, if any, monument or anything else, was done on that claim between the 10th of July and the 23d of October, 1893?

A. There was nothing else at all, nothing but that I say.

(Record, page 144.)

The wife of Pilkey testifies to the same effect, that nothing else was done upon the claim between the 10th of July and the latter part of September, when she and her husband finally returned to Albuquerque; that they passed over the claim some three or four times, looking for horses. (Record, pages 179-180.) See also Leeds' testimony, (page 210 of the record,) and also that of Bonsall, Receiver, (Record, page 214,) which shows that no work was done upon the claim, except that which was done under the Washington location after the 23d of October, 1893.

From the evidence, it will thus clearly be seen that nothing was done upon this claim which would have amounted to actual continuous possession between the 10th day of July, 1893, when the "Sampson" location notice was posted and the 23d day of October following, when the Washington location notice was posted.

The Territorial statute provides that "any person * * desiring to locate a mining claim upon a vein or lode * * must distinctly mark the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location, a notice in writing, stating thereon, the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument, as will identify the claims, also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted." (*Compiled Laws, N. M., 1897, Sec. 2286, Record, page 289.*) It also provides: "That the locator or locators of any mining claim * * shall within ninety days, from the date of taking possession of the same, sink a discovery shaft upon such claim, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit or open cut upon such claim, to at least ten feet below the surface, exposing mineral in place." (*Compiled Laws, N. M., 1897, Sec. 2298. Record, page 289.*)

Section 2 is as follows: "The surface boundaries of all mining claims hereafter located, shall be marked by four substantial posts or four substantial monuments of stone set at each corner of such claim. Such posts or monuments of stone shall each be plainly marked so as to indicate the direction of such claim from each monument of stone or posts." Compiled Laws, 1897, Sec. 2299. Record, page 289.

The plaintiff offered the evidence of several wit-

nesses, among them Fergusson, Neeland, Stella Metz and Ellen L. Lockhart, for the purpose of proving that Pilkey, the prospector, had entered into a conspiracy with one Frank Fagaly and Levy Walker, two of the locators of the "Washington" claim of the defendants, and agreed with them to fail to do the things required by the statute, that is to say, ten feet of work, the erection of proper monuments and the recording of the location notice within three months from July 10th, the date of the "Sampson" location notice, so that the ground would be vacant and open to location by them on October 10th. It was also claimed that in accordance with this understanding the Washington was visited by Fagaly prior to the 10th of October, but actual possession was not taken and the notice of location posted on it until the 23d of October. It is further claimed that when it was located, Levy Walker was to have two-fifths undivided interest in the claim, one-fifth for himself and one-fifth for Pilkey. The evidence so offered consists of declarations claimed to have been made to those witnesses by Fagaly and Walker at different times. This evidence was ruled out by the Court upon the ground that as no valid mining location had been shown by the plaintiff, the only issue was as to whether the plaintiff was in actual possession at the time the Washington locators entered and made their location. (*Record, page 132.*) "The fact that Pilkey and Fagaly were scheming all summer, and Pilkey deceiving him, does not affect the quality of Lockhart's acts as to abandonment. * * It is simply a question whether Lockhart prosecuted the work on the claim according to the nature of the property he was

endeavoring to hold, or did not. If he did prosecute the work, then he held it; if he did not prosecute the work, he did not hold it." (*Record, pages 244-5.*)

The general statemeut of the offer of this class of evidence in the brief of plaintiff in error is based on the written offer in the record, page 248-9, and on page 11 of the brief. Such an offer is not a proper way to to raise the question of the admissibility of evidence. Several of the witnssses referred to in this offer were placed upon the stand and examined in the absence of the jury, and an examination of the evidence will show that not one of them stated that either Fagaly or Walker had ever taken any possession of the claim prior to October 10th. It will be necessary to examine the testimony of several of these witnesses separately as to the competency and relevancy of the statements of Walker, Fagaly and Pilkey attempted to be shown by them. The testimony of witness Fergusson, was objected to upon the additional ground that it was a privileged communication, he being Fagaly's attorney. By none of these witnesses was any substantial fact offered to be shown but only declarations of the parties.

The question as to whether or not the land was subject to location under the mining laws was not raised in the district court. The court did not try the case upon the theory of forfeiture for non-compliance with the mining laws as stated in brief of plaintiff in error. (*Plaintiff's brief, pafs 30.*) The extract from the trial judge's rulings shows that he held the issue to be whe her there had been a *continuous actual* possession of a defined mining claim up to the time that possession was taken by the locators of the Washington, or whether there had been an abandonment by the Samp-

son locators. On the conclusion of the evidence, upon the ground that there was not sufficient evidence of such possession to sustain a verdict for the plaintiff, he instructed the jury to find for defendants. The mining laws were applied by the trial court in reaching this conclusion by analogy. The ground in controversy was located within the limits of the private land claim known as the Canada de Cochiti Grant, as claimed by the alleged owners of that grant. At the time these locations were made, a suit was pending in the Court of Private Land Claims for the confirmation of the grant. It was confirmed on the 29th day of September, 1894, and the premises in controversy were not included within the limits of the grant as confirmed. An appeal was taken from the Court of Private Land Claims to this Court, and the decree of the first court modified by this Court. The grant, however, as finally confirmed did not include the premises in controversy. *Whitney vs. United States, 167 U. S., 529.* The status of these lands as to the mining laws was not considered until the final decision of this cause. (*Record 282.*) *Lockhart vs. Wills, 9 N. M., 344.* An examination of the evidence will show that all the parties to this cause thought until the winter of 1894, when the rights of all parties had already become fixed, that the premises in controversy were located upon the *unclaimed public* domain of the United States, and were subject to the mining laws. Plaintiff states that the first knowledge he had that the claim was within the Cochiti Grant, as claimed, was in the winter or spring of 1893-4. (*Record, 35.*) Pilkey also thought it was government land. (*Record, 163-4.*)

As already stated, there were four other mining

claims located by Pilkey in the names of himself, plaintiff and Ben Johnson. The location notices for these claims were all filed for record by the plaintiff himself. Not one of them was filed by Pilkey. Three of them were filed within the three months after possession was taken and before any notice that the statutory requirements had been complied with. All three claims were filed on the same day, July 11th. (Record, page 52, also page 238.) The other claim, the Columbus, was recorded on the same day that the Sampson was. (Record, pages 149-150.) No work was ever done on the Columbus. He had received a copy of the location of the Sampson the latter part of August, or the first of September, when he said he was there and examined the claim. Mrs. Pilkey says August 20th. (Record, 179-189.)

Pilkey asked him to send provisions, and let him know from the assay if the work was worth doing. This plaintiff never did. He pretended that he was waiting for Pilkey to notify him that ten feet of work was done on the Sampson, (Record 52.) before recording. Yet he never was so notified. (Record 52-53.) No work had been done on the claim up to September 1st, when Lockhart received a copy of the location notice. (See Record, pages 22, 23.)

On or about ~~August~~ October the 5th, Pilkey came to Albuquerque—about two days' travel from the claim, by private conveyance, demanded pay for his work on the Ellen L., and a copy of the assay of the ore, which plaintiff had taken from the "Sampson." Plaintiff refused to pay him for the work or satisfy him about the assay. (Record, 63-69-70.) Johnson gave him an order on the assayer for the assay, and agreed to pay

him for the work he had done, which he afterwards did. Pilkey offered to take Johnson to the claims so he could relocate them or hold possession of them. (Record, 145-6-7.) The fact that Pilkey notified the plaintiff and Ben Johnson of the fact that he fully repudiated the contract, and would have nothing further to do with the claims as early as October the 6th, is fully corroborated by the testimony of Ben. Johnson, and a disinterested witness, W. A. Skinner. (Record, 180, 181, 182, 200-208.) The statement of Pilkey as to this is undenied and fully corroborated. (Record 171.)

Pilkey never returned to the mines after he came to Albuquerque and repudiated the contract, until November. Both he and his wife so testify, and it is undisputed, except by the evidence of declarations of Fagaly made to Fergusson, which was excluded by the Court. (Record, 147-8, 178.)

Plaintiff, however, testifies that he thought matters had been smoothed over, and stilll relied npon Pilkey to perfect the location, although both he and his co-partner Johnson, had been notified by Pilkey on October 5th, that he, Pilkey, had repudiated the contract and would do nothing more under it. (Record, pages 253, 255.) The contract was rescinded by Pilkey, and it is not pretended that any work was done by Pilkey after October 6th. Johnson paid for work done on one of the claims, the Ellen L., prior to October 6th, 1894. (Record, pages 208-9.) Plaintiff did not record the notice until after he knew the "Washington" claim had been located and a car-load of ore had been hauled to the railroad and shipped from it. The notice was recorded on December 9th. (Record, 62.) Plaintiff

himself attended to recording the location notices, and called Ben. Johnson's attention to it, after the recording. (Record, 201-2.)

The foregoing facts are undisputed, and are fully sustained by the record. It was from a consideration of these uncontroverted facts that the trial court was led to instruct the jury to find for the defendants. The trial court held that the plaintiff had to recover on a naked prior possession, that the evidence failed to show an actual continuos possession, but on the contrary showed that Lockhart and Johnson had abandoned the claim, and that the recording of the location notice of the "Sampson" and the Columbus was due alone to the fact that the "Washington" locators had opened up a very promising vein and were shipping ore out of it. The location notice of the "Columbus" was filed at the same time, and plaintiff admits that no work had been done on it.

Judge Parker in his opinion reaches the conclusion, that "Plaintiff failed to show, or offer to show that he was prevented in any way from perfecting his location by reason of any unlawful entry and ouster by defendants, prior to the expiration of the ninety days, and he showed the location under which defendants testified (claimed) to have been made after the ninety days expired." The Court in the last opinion dissents from the view expressed by the Supreme Court on the first hearing as to the materiality of the rejected evidence. The Court in the second opinion, it is true holds that the ground was subject to location under the mining laws and discusses the case from that standpoint. The trial Court, however, applied the same principles to the case by analogy. Plaintiff had testified that he

thought the claim was on government land and showed that he was entirely familiar with the requirements of the mining laws, and made no effort whatever to comply with them. Neither he nor Ben. Johnson made any effort to go to the claim and commence compliance with the law. Although admittedly notified by Pilkey that the work had not been done, and although Pilkey offered to take Johnson and put him in possession. This was on October 6th. Four days were ample time to go a distance of about 75 miles, fifty of which can be traveled by railroad. He certainly could have recorded the copy of the location notice as well in October, as in December. These are the undisputed facts which induced the trial Court to give the instruc tion to find for the defendants.

The Supreme Court on the second and final hearing of the case held that the land was not reserved from entry because a suit for confirmation of a grant, within the claimed limits of which is was situated, was pending in the Land Court. If subject to location under the mining laws, the failure to do the work, properly monument the claim, and record the location notice operated as a forefeiture, whatever the reason for the failure was, unless it was prevention by physical force or occupancy of the premeises, and the evidence clearly shows that there was no such prevention. If this proposition of law is sound, it fully disposes of the case.

It is immaterial that the trial court applied the mining law by analogy, instead of holding that it was directly applicable, if as a matter of fact, it was either applicable by analogy or directly so. In either view

of the case, defendants in error insist that the Court properly instucted the jury to find for the defendants. We deem it proper and more convenient, however, to first discuss the status under the law, of the ground in question, as to the mining laws:

BRIEF.

I.

The Supreme Court correctly held as to the land in controversy as follows: "There being no reservation of these lands within claimed grants in New Mexico, by treaty, law or authorized act of the executive department (Wolsey vs. Chapman, 101 U. S. 755), we conclude that they are not reserved lands and are 'Lands belonging to the United States within the meaning of section 2319 of the Revised Statutes of the United States.'". In other words that lands within the claimed limits of an unconfirmed Spanish or Mexican grant, in New Mexico, were subject to location under the mining laws of the United States. The stipulation between the parties states that the land was within the limits of the Canada de Cochiti tract, as said claim was surveyed and approved by the surveyor general, June 29th, A. D. 1888. That said private land claim was never confirmed upon the report of the surveyor general; that petitions for its confirmation were filed in the Court of Private Land Claims in 1893, and a decree of confimation rendered in that Court on September 29th, 1894; and that said premises were not included in the boundaries of the grant as confirmed by that Court. Further that an appeal was taken from the

decree of the Court of Private Land Claims to the Supreme Court of the United States, and was pending undetermined at the date of the stipulation, which was signed and filed on the trial of the cause on February 12th, 1896. (Record 31.) A copy of the decree of the Land Court was a part of the stipulation. (Record 32-33.) The reasoning of the Court and the authorities cited are so conclusive, that the defendants in error might solely rely upon the opinion of the Court below. (Record 283.) Lockhart vs. Wills, 9 New Mexico Rep., 344.

We do not understand why the stipulation as to the status of the grant as claimed, and of the premises in controversy, being a part of the record, does not properly raise the question as to the applicability of the mining laws. The New Mexico statute, Sec. 3141 of the Compiled Laws of New Mexico, has never received, and is not susceptible of the construction placed upon it by the plaintiff in error. That statute is as follows:

"The Supreme Court in appeals or writs of error shall examine the record, and in the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."

Plaintiff in error seems to think that although the ruling of the Court below may have been correct, upon the facts disclosed by the record, in point of law, yet if the trial court failed to give the true reason for its decision, the appellate court can not affirm it. The

Court below on this subject said: "The assigning of a wrong reason for an act by the Court below is not error, if the act done was in law right." citing Wismer vs. Brown, 122 U. S. 214. In that case the opinion concludes as follows: "Our conclusion therefore is that the instruction to find for the defendants was right at all events, for they were entitled to such an instruction on the law of the two years' limitation, whether they were so for the reason assigned by the judge or not." Wismer v. Brown, 122 U. S., 220.

In Evans v. Pike, 118 U. S., 250, the Court also decided that where plaintiffs were not entitled to recover on their own showing, an incorrect charge to the jury did them no injury, and affirmed the case. In another case this Court said:

"Conceding, for the purpose of this opinion, that the court below erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect. This is decisive of the case before us. The defendant in error is entitled to have the judgment affirmed."

Barth vs. Clise, 12 Wall., 403.

II.

The status of the land in controversy as to being subject to location under the mining laws, was properly considered by the Supreme Court, and if its conclusion was correct, settles this case in favor of the defendants in error, and eliminates, as the Territorial Supreme Court said, all the questions raised as to the admissibility of evidence.

Were these mining claims subject to location under the mining laws?

The land in controversy in 1893, when the "Sampson" and "Washington" mining locations were made, was a part of a claimed Spanish or Mexican land grant, which had never been confirmed, and a suit for the confirmation of which was then pending, and which suit subsequently and prior to the determination of this cause in the court below, had been decided adversely to the grant claimants, as to the land in controversy in this cause. The stipulation states that these mining claims were not included within the grant as confirmed. An appeal had been taken to the Supreme Court of the United States, and was pending in that Court at the time of the trial of the cause in the District Court, according to the stipulation. We therefore contend that in 1893, this land being in fact public domain of the United States was subject to location under the mining laws of the United States. The mining laws declare:

"All valuable minieral deposits in lands belonging to the United States both surveyed and unsurveyed are hereby declared to be free and open to exploration ond purchase, and the lands in which they are

found to occupation and purchase by citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Revised Statutes of the U. S. Sec. 2319.

Did this land belong to the United States in 1893? That is a question of fact. It had not been determined in 1893. It was so determined in 1894. The validity of a mining location made in 1893 depended alone, under the terms of the statute, upon the fact as to whether the lands were or were not "lands belonging to the United States." The circumstance that the ownership of the lands by the United States had not at that time been determined by any competent tribunal, is wholly immaterial, unless some other statute by its terms excluded them from the scope of the general statute declaratory of what lands, title to which, could be acquired under the mining laws. In a general way, it has been contended, that lands subject, although in fact "belonging to the United States" are not subject to entry under the homestead, preemption or mining laws of the United States. In other words, any claim set up to such lands, as against the United States however unfounded in fact and law, it is claimed at once operates to make them not "lands belonging to the United States," although subsequent adjudication may determine the fact to be that they are "lands belonging to the United States." No such exception can be

read into the statute above quoted, unless some other statute can be cited which renders such a construction necessary.

We will endeavor to show that wherever such lands have been held to be reserved from entry under the mining laws, or the homestead and preemption laws of the United States, there was some specific statute which excepted them. Section 2289 of the Revised Statutes of the United States declares:

"That every person who is the head of a family * * * *shall be entitled to enter one quarter section or a less quantity of unappropriated lands. * * * *"

Section 2257 proviles:

"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished shall be subject to the right of preemption under the conditions, restrictions and stipulations provided by law."

We have quoted the foregoing provisions for the purpose of showing the right to enter upon and occupy lands under the mining laws are just as broad as the right to do so under the homestead and preemption laws. Any land subject to entry under the homestead and pre-emption laws, if mineral in character, is subject to location under the mining laws.

The land included in this grant as surveyed by the surveyor general was reserved from sale or other disposal under the povisions of Section 8 of the Act creating the offices of surveyor general of New Mexico, Kansas and Nebraska, passed July 22, 1854, Stat at Large, Vol. 10, p. 308.

This section provided that it should be the duty of

the surveyor general to ascertain the origin, nature, character and extent of all claims to land under the laws, usages and customs of Spain and Mexico, and make a full report on all such claims as originated before the cession of the Territory to the United States, with his decision as to the validity or invalidity of each of the same, which report was to be laid before Congress for such action thereon as might be deemed just and proper, etc., And provided a reservation in the following words:

Section 15 of the Act of Congress, approved March 3rd, 1891, establishing the Court of Private Land Claims, is as follows:

"That section eight of the Act of Congress approved July twenty-second, eighteen hundred and fifty-four, entitled 'An act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

Thus the only law which exempted the land in controversy from the operation of the general statute as to what lands of the United States were "to be free and open to exploration and purchase" under the mining laws of the United States, was expressly repealed.

It may be worth mentioning in this connection that the New Mexico Bar Association, after the passage of the Act of 1891, had under consideration the effect of the repeal of Section 8 of the Act of 1854, above quoted, commonly called in New Mexico, the

Surveyor General's Act, and memorialized Congress as follows:

"The fifteenth section of the act provides for the repeal of the eighth section of the Act of Congress of July 22, 1854. That section contained a clause reserving from sale or other disposal all lands included within claims presented to the surveyor general of New Mexico. The repeal of the section also repeals this reservation which can not have been the intention of Congress. We therefore urge the addition of a proviso to section fifteen, in the following language:

"Provided, That all lands included within any private land claim which shall have been filed with any of the surveyors general of the states and territories mentioned in this act, pursuant to the terms of said act, which has not been finally decided on by Congress, and which shall also be filed in the Court provided for by this act within the time limited by section twelve of this act, and all lands included within any private land claim filed in the Court provided for by this act, shall be reserved from entry, sale or other disposal by the United States until finally decided under the provisions of this act."

Congress has never passed the amendment recommended. In the opinion of the leading lawyers in the Territory, there was no reservation of this land in 1893. The cases decided by this Court amply sustain this contention. Several acts were passed for the settlement of French and Spanish claims in the Territory of Louisiana, which contained reservations in these words:

"Provided, however, that until after the decision of Congress on these claims, no tract of land shall be offered for sale, the claim for which had been in due time presented to the Recorder of Land Titles in the district of Louisiana and filed in his office for the purpose of being investigated by the commissioners for

the purpose of ascertaining the rights of persons claiming lands in the Territory of Louisiana."

This act was passed in 1811. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of the 9th of July, 1832.

Thus there was an interval of a little more than three years during which it was not in force. A New Madrid location had been made by the defendant while this reservation was in force, upon a tract filed under the act. In considering the effect of the reservation and the attempted entry of the land, this Court said:

"His location was made on lands not liable to be thus appropriated, but expressly reserved and this was the case when his patent was issued. Had the entry been made or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832, the title of the defendant could not be contested."

Stoddard vs. Chambers, 2 How., 285-318.

No case could possibly be stronger or more pertinent for the purpose of sustaining our contention. We might safely rest upon it. But there are other decisions.

"There can be no reservation of public lands from sale except by some treaty, law or authorized act of the executive department of the government."

Wolsey vs. Chapman, 101 U. S., 755-769.

Decisions of this Court are quoted to sustain the proposition that the pendency of a claim for the confirmation of a Spanish or Mexican land grant or itself

operates as a reservation of the land within the claimed limits of the grant, from entry under the homestead, preemption or mining laws of the United States. An examination of the cases decided by this Court furnishes no support for such a claim.

The case usually quoted in favor of this contention is Newhall vs. Sanger, 92 U. S., 761. It is an authority against such a contention, because the express statuatory provision creating the reservation is referred to in the opinion, as the reason for the Court's conclusion. The question before the Court was whether or not the land included in a Mexican grant then pending for confirmation, passed under a legislative grant to a railway company. The act granting alternate sections to a railroad company declared that the act

"Shall not defeat or impair any preemption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler."

The Court states it as follows:

"And the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then sub judice, are public within the meaning of the Acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company."

The Court in discussing the question says:

"The status of lands included in a Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the tme it was ceded, and by our subsequent legislation."

The Court then proceeds to discuss the legislation creating the commission to settle Spanish and Mexican grants in California, and the act extending the public land system over California, the pertinent provisions of which are as follows:

Section 6 of "An act to provide for the survey of the public lands of California, the granting of preemption rights therein, and for other purposes," passed March 3, 1853, 10th Statutes at Large, page 240, provides, "that all the public lands in the state of California . . . . . with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the land claimed under any foreign grant or title and the mineral lands shall be subject to the preemption laws * * *"

Section 13 of the Act of March 3, 1851, 9th Statutes at Large, 631, creating a commission to settle private land claims, provides, "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act, shall be deemed, held and considered a part of the public domain of the United States."

The Court, after a full discussion of these statutes, concludes:

"It is unnecessary to dwell longer upon this question, or to review subsequent statutes governing lands in California. It suffices to say that there is nothing in any of them which weakens the construction we have given to the Act of 1851. This controversy depends upon that act and the Pacific Railroad Acts which we have cited."

Thus it will be seen that the Court held that the

land in the grant did not pass to the railroad, because it did not become public land under the provisions of the act creating the California commission until "finally decded to be invalid." The case when carefully read and understood is a strong one in favor of the defendants in error. All the other cases from California were decided upon the same principle.

See Van Ravnegan vs. Bolton, 95 U. S., 33.

Hosmer vs. Wallace, 97 U. S., 575.

Trenouth vs. San Francisco, 100 U. S., 251.

Aurrecoechea vs. Bangs, 114 U. S., 381.

Dolan vs. Carr, 125 U. S., 618.

See also Grant vs. Jaramillo, 6 N. M., 313.

Chavez vs. Chavez, 7 N. M., 58.

In U. S. vs. McLaughlin, 127 U. S., 428, 454, 455, the Court fully reviews the case of Newhall vs. Sanger and shows that the decision rests upon the provisions of the two statutes above quoted, as I am contending. Newhall vs. Sanger is again considered in Carr vs. Quigley, 149 U. S., 652, but there is nothing in the opinion bearing on our present inquiry. It does show, however, the difference between Mexican grants and Indian reservations, and why cases based on Indian reservations are not in point.

From these cases, it unquestionably follows that a reservation from entry and location can only be the result of a statute or executive action in pursuance of a statute. The repeal of a statutory reservation, then must throw the land open to entry and location.

The question suggests itself as to what would have been the effect on these mining locations of a confirmation of the grant, with boundaries including them.

The act creating the Court of Private Land Claims provides that the mineral shall not pass with the grant, but shall be reserved to the United States, but that it shall not be worked without the consent of the grant owner until Congress provides regulations therefor. This however, is immaterial, as to the lands decided to be without the grant. Until the grant is confirmed the grant owner has no right whatever. He can not maintain ejectment or any other form of suit against occupants.

Pinkerton vs. Ledoux, 129 U. S., 346.

Botiller vs. Dominguez, 130 U. S., 238.

Astiazaran vs. Santa Rio Land and Min. Co., 148 U. S., 80.

A complete answer to this is that the locator of a mining claim makes his location at his peril before the grant is finally acted upon. If it is confirmed covering his location, he cannot perfect his title. If his location is left out of the grant as confirmed, he can. And at no time, if the grant is confirmed leaving out the location, does it lie in the mouth of a stranger to the grant title to question his right to locate under the mining laws. Under the authorities above cited the grant owner himself cannot question it before confirmation.

Pinkerton vs. Ledoux, 129 U. S., 346.

It therefore is immaterial that the record does not affirmatively show that the grant as to this mine had already been rejected by the Supreme Court of the United States. The important fact was that it had not been confirmed.

In conclusion we may ask upon what principle of law can the mere bringing of a suit for a piece of land operate ipso facto as a supersedeas? What is the difference in this respect between the suit to confirm this grant and a suit between individuals to establish title? Defendants in error claim under the United States. The presumption is that it is government land until the contrary is shown. The grant claimant must establish his claim in the mode provided by Congress, before it becomes anything else but public land.

Cases last cited supra.

While he is trying to do this, it is government land as much as any other part of the public land unless Congress has otherwise provided. In this case Congress has expressly repealed the provision which did otherwise provide.

III.

If the mining laws were applicable, the plaintiff's failure to complete a valid location by compliance with the statutes, left the land open to location by the "Washington" locators on that day.

His failure, within the three months which expired on October 10th, to mark his boundaries, do the work on the claim, and record his location notice as

required by the statute, operated as a forfeiture of any rights acquired by going on the claim and posting the location notice of the "Sampson" on July 10th.

This Court in Belk vs. Meagher, 104 U. S., 287, said:

"His ultimate right to a patent depended entirely on his keeping himself in, and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold possession, which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got, if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force."

104 U. S., 287.

In the same opinion, it is said:

"The right to possession comes only from a valid location; consequently if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made from taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations."

See the provisions of the New Mexico statute relating to mining claims, which have already been quoted in this brief, as a part of the statement of facts. Supra, page 10.

Such local statutes as these have been uniformly held valid, as to the amount of work necessary to be

done to perfect a location, as to the manner of marking the boundaries on the ground, and as to the requirement that the location notice be recorded.

In Belk vs. Meagher, supra, it is held that where recording of the notice is required, the notice must be recorded within the prescibed time, or the ground will be subject to location by any other locator who makes a peaceable entry on it for that purpose.

Belk vs. Meagher, 104 U. S., 287.

To the same effect, see

Faxon vs. Barnard, 4 Fed. Rep., 703.

Mallett v. Uncle Sam Min. Co., 1 Nev., 188.

This Court in Kendall vs. San Juan Mining Company, expressly holds the same thing. "As they failed to comply with the law in making a record of the location certificate of their claim, it does not lie with them to insist that their wrongful entry upon the premises * * operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law."

Kendall vs. San Juan Min. Co., 144 U. S., 665.

The Courts of New Mexico have uniformly held that the plaintiff in ejectment for a mining claim must show a valid location notice, properly recorded and that the claim has been properly staked and monumented on the ground, as against a defendant, who after plaintiff's failure to do these things within the time required by law had peaceably gone on the

ground and initiated his rights under the mining law, otherwise he can not recover.

Wills vs. Blain, 6 New Mex., 238.

Seidler vs. LaFave, 5 New Mex., 44.

Baxter Mt. Min. Co. vs. Patterson, 3 New Mex., 269.

The question of forfeiture is a question of law, and if the evidence showing it was undisputed, it was the duty of the Court to take the case from the jury.

Fairbanks vs. Woodhouse, 6 Cala., 434.

The failure of the plaintiff to do any of these three things—place proper monuments on his claim, do the location work and record the notice—all of which were not done according to his own evidence, precludes his recovery in an action of ejectment. It is wholly immaterial as to what caused the failure, as we will endeavor to hereafter show.

The Supreme Court of the Territory, at the request of the plaintiff in error, made findings of fact. This was not necessary or proper in a case at law, but they are in the record and correctly state what the undisputed evidence shows as to the essential facts in the case.

(Record 279-280. Plaintiff's brief, page 15.)

IV.

The contention of the plaintiff in error that the treaty of Guadalupe Hidalgo itself operated as a reservation of this land, and the holding of the Secretary of the Interior that the repeal of the 8th section of the Act of 1854 creating the reservation, did not

have any effect on the reservation is so fully met by the opinion of the Supreme Court of New Mexico, that we might safely content ourselves by referring to it. The Secretary of the Interior had jurisliction of the matters before him when he rendered the opinion cited. It is not binding upon the courts, however. It is difficult to see how the repeal of the statute which alone authorizes and creates the reservation, can be held not to effect the reservation itself. Congress evidently did not take this view of the subject, for section 14 of the Act of 1891 provides that "if in any case it shall appear that the lands, or any part thereof, decreed to any complainant under the provisions of this act, shall have been sold or granted by the United States, to any other person, such title of the United States to such other person shall remain valid, notwithstanding such decree." And this, although the Court may hold the land grant valid, and that it includes land so sold, and we respectfully submit that such a contention is directly at variance with the principle laid down by this Court in the case of Stoddard vs. Chambers, 2 How., 285, supra. As the court below says: "The right to the possession of a mining claim is never a matter for the determination of the land department of the government. Location and possession of a mining claim is determined by the federal and local legislation, and not until the locator seeks to obtain a patent for his mining claim, does he come in contact with the land department, and even then, if his right to the possession of the claim be contested, the whole matter is referred by

the land department to the Court for determination."

Lockhart vs. Wills, 9 New Mex., 344.

The contention of the plaintiff in error, that the reservation existed by reason of the treaty is not sound. The treaty itself creates no such reservation, and none could be created, except by Act of Congress.

Boutiller vs. Dominguez, 130 U. S., 247.

Plaintiff in error in his brief, quotes numerous decisions of the land department to the same effect as the Secretary's. The Supreme Court of New Mexico is correct in its conclusion that this land was reserved for entry, as already stated. These decisions of the land department are immaterial. In a case where a similar contention was made, as to the effect of the action of the land department, holding that certain lands were reserved and did not pass under the congressional grant for that reason this Court says:

"But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department. Johnson vs. Towsley, 13 Wall., 72; Shepley vs. Cowan, 91 U. S., 330; Quinby vs. Conlan, 104 U. S., 420; Doolan vs. Carr, 125 U. S., 618, 624; Lake Superior Ship Canal &c., vs. Cunningham, 155 U. S., 354."

Neither is the contention sound, that this case is

parallel with the location of mining claims upon lands set apart by treaty with Indian tribes for the Indians. The treaties are made, in pursuance of express statutory authority, with the Indians, and the lands expressly reserved and set apart by such agreement in accordance with statutory power vested in the executive department of the government. We, therefore, submit that the case of Kendall vs. San Juan Mining Co., 144 U. S., 663, cited by plaintiff in error, has no bearing whatever upon the propositions raised by this case.

V.

"Forfeiture" and "abandonment" are not synonymous. The first depends upon facts alone, the second upon fact and intent. In case of forfeiture, intention is immaterial.

Mallett vs. Uncle Sam G. & S. Min. Co., 1 Nev., 188.

"The term forfeiture, as used in our mining customs and codes, means the loss of a right to mine a particular piece of ground previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings, in which the ground is situated, prescribing the acts which must be done in order to continue to keep alive that right after it has once been acquired. As a defense, it is entirely distinct and separate from abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether in point of fact those rules and regulations have been observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been, whereas the principal question in the defense of abandonment is one of in-

tention."

St. John vs. Kidd, 26 Cal., 264.

4 Mor. Min. Rep., 462.

"Mining laws are to be construed by the Court, and the question whether by such laws a forfeiture has occurred, is a question of law. To submit such questions to a jury is error."

Fairbanks vs. Woodhouse, 12 Mor. Min. Rep., 86. 6 Cal. 433.

The facts as to forfeiture was absolutely undisputed. The work was not done, the claim was not staked or monumented, and the notice was not recorded as required by law.

"Forfeiture" for non-compliance with mining district rules and regulations should not be confused with forfeiture for non-compliance with United States and territorial laws; and failure to comply with these statutes works a forfeiture, whether the statute says so or not."

VI.

All evidence of alleged conspiracy and collusion between Pilkey and the "Washington', locators, Fagaly and Walker, is wholly irrelevant, because it is immaterial how or why the failure occurs which works a forfeiture.

In Saunders vs. Mackey, 5 Montana, 523, 6 Pac. Rep., 361, the defendant promised to do the annual work and failed to do it, and after such failure relocated the ground for himself, the Court says:

"Title to the public mineral land is acquired and held by discovery, location and representation in the manner provided by law. Representation from year

to year keeps alive the grant. If representation fails, the grant fails, and the ground is open to relocation and purchase. The terms of the law are absolute. There are no exceptions. If the representative work for the year is not performed, the gound located becomes again a part of the public domain. An agreement to represent is not a representation. After a period of representation has expired, an agreement to represent, not performed, cannot save a claim from forfeiture and relocation. Such an agreement would not have the effect to keep alive the grant. It would not revive a right already lost. It would not tide over a period of representation from year to year and prevent a relocation of the ground. It is not material for what reason there has been a failure to perfom such an agreement. The conclusive fact is that the gound has not been represented. Congress alone has the authority to dispose of the public lands. If an agreement between individuals could prevent a relocation of the public mineral lands, then the primary disposal of the soil may be taken from Congress and confided to the contracts of private parties. The fact that these parties were tenants in common does not affect the question of representation. Mining claims so owned must be represented as if owned by one person."

5 Montana, 523.

In Doherty v. Morris, 11 Colo. 12, the ~~plaintiff claimed~~ defendant promised to do the work on the mine, but failed to do it, entered into a conspiracy with the other defendants to let the claim be forfeited and relocated it for failure to do the work. It is a much stronger case of conspiracy than it can possibly be claimed the rejected evidence in this case tends to show. The evidence here shows that the plaintiff himself could have recorded the location notice and failed to do so, and the claim would have been forfeited whether there

was any conspiracy or not. The court said:

"Under the allegations of the amended complaint, an effort was made upon the part of the plaintiff to show that there was a conspiracy between Doherty and Bryan to make default on the assessment work, with a view to the relocation of the lode by Doherty. However this may have been, and whatever the complainant's equities in view of it, the fact remained that the annual work was not done, and this was conclusive against the plaintiff's right to recover in the suit in support of his adverse claim. In this connection, the court erred in telling the jury, in its fifth instruction, that if they believed from the evidence that Doherty and Bryan conspired together to relocate the claim in order to shut out the interest of the plaintiff, the plaintiff was entitled to recover."

To the effect that a co-tenant can relocate an abandoned or forfeited claim to the exclusion of his co-tenants, also see

Neither is there any rule of law which makes a subsequent relocation of a mining claim by a co-owner enure to another co-owner's benefit. A co-owner can relocate and exclude his other co-owners.

Strong v. Ryan, 46 Cal., 33

It is said in Sauders v. Mackey, 5 Montana, 523, supra, "If the respondent," who was a co-owner, and promised to do the work, called representative work in Montana, and failed to do it, and relocated the claim in his own name, "has violated his contract, he is liable in damages for a breach thereof, and if the relations between him and Julia D. Saunders were such as to make him her trustee, in the location of the

Baltimore claim, a proper action would so declare him, and protect her interest therein, but there is nothing in the complaint to invalidate the Baltimore location and claim."

This exact doctrine is announced by Judge Sawyer in Hunt v. Patchin, 35 Federal Rep., 816. These principles when applied, clearly show that plaintiff could not recover in this action of ejectment, and that all the evidence of conspiracy and combination between the locators of the "Washington" and plaintiff's co-owner, was immaterial. We do not want to be understood as admitting that this evidence, however, would under any circumstances have made out a case entitling the plaintiff to relief, either in equity or at law.

VII.

This is not a suit brought under section 2326 of the Revised Statutes of the U. S. It is a plain statutory ejectment under the ejectment statute of the Territory. The plaintiff must recover on the strength of his own title, not on the weakness of his adversaries. At the time this suit was tried, there was no commingling of equitable and legal remedies, nor is there yet as to the action of ejectment.

Sec. 3160, Compiled Laws of N. M., "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

Sec. 3164, Compiled Laws of N. M., "It shall be sufficient for the plaintiff to declare in his petition that on some day, in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the petition, afterwards entered into such premises, and

unlawfully withheld from the plaintiff the possession thereof, to his damage ,for any sum he may name."

Sec. 3165, Compiled Laws of N. M., "The defendant may plead, Not guilty, and under such plea give in evidence any testimony showing that the plaintiff is not entitled to such possession, or that the title is in some other person?"

Sec. 3166, Compiled Laws of N. M., "To entitle the plaintiff to recover in an action of ejectment, it shall not be necessary for the plaintiff to prove that at the time of the commencement of the action the defendant was in possesion of the premises claimed, but the fact of such possession shall be taken as admitted by the defendant upon his filing a plea of not guilty."

Sec. 3168, Compiled Laws of N. M., "It shall be sufficient to entitle the plaintiff to recover, to show that at the time of the commencement of the action the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof."

These are the material parts of the New Mexico statute on ejectment.

"In the ordinary action of ejectment a defendant may rely upon the weakness of plaintiff's title, but in the proceeding contemplated by the Revised Statutes, in the light of the amendment of March 3, 1881, both parties are regarded as actors, and some of the rules pertaining to ordinary actions are necessarily modified in the trial of such cases." Lindley on Mones, Sec. 763.

Plaintiff would have to show facts entitling him to hold as against the United States in such a case. The rules applied in such cases do not therefore apply in this.

Gwillim v. Donnellan, 115 U. S., 45

Neither does the principle invoked by plaintiff in

error on page 28 of his brief apply here, namely, that where the legal title is outstanding in a third person, in this case the United States, "the courts regard the better right as between the parties to be vested in the first possessor." A valid mining location, although unpatented, is equivalent to a legal title, and is so expressly recognized by the New Mexico statute, and all the decided cases.

In 1865, Section 910 of the Revised Statutes of the U. S. was enacted, providing that "no possessory action in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

1 Lindley on Mines, Sec. 538.
Rev. Stat. of U. S., Sec. 910.

Section 3161 of the Compiled Laws of New Mexico, supra applies the same principles by making unpatented mining claims real etstate for the purposes of an action of ejectment.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Actual possession is not more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant."

1 Lindley on Mines, Sec. 539, citing
Noyes v. Mouth, 127 U. S., 348;

Belk v. Meagher, 104 U. S., 279;

Gwillim v. Donnellan, 115 U. S., 45.

"Yet as between the locator and everyone else, save the paramount proprietor, the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied the character of the tenure remains that of a fee."

Lindley on Mines, Sec. 539.

V.

If our contention is right, as to this ground being subject to location under the mining laws, the case stands in an action of an ejectment, as if the defendants had a perfect legal title, and the plaintiff by his own testimony admitted that he had no title.

VIII.

The plaintiff in error's statement of the law, in cases where neither party has any title, and their rights are to be determined on the law of naked possession, is singularly inaccurate. The prior possession unless continued, adverse and uninterrupted, until intruded upon by the defendant, does not make out a *prima facie* case for the plaintiff.

This Court has announced in suits for the recovery of mining claims, the rule we contend for, and not that which plaintiff in error contends for, namely:

"In such cases the rule which applies to actions of ejectment, and to all actions to recover possession of real estate applies, namely, that the plaintiff can only recover on the strength of his own title, and not on the weakness of defendant's title.

"Whether the defendant has title or is a mere trespasser, it is crtain that he is in possession, and that is a sufficient defense against one who has no title at all, and never had any."

Reynolds v. Iron Silver Min. Co., 116 U. S., 687-698.

Under the New Mexico statute above quoted, the defendant must show that he had a right to the possession at the time suit was brought. It is not sufficient for him to show that at some prior time he had been in possession.

"If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show some title, you have no right to disturb me, it has not been pointed out to us."

Reynolds v. Mining Co., 116 U. S., 692.

IX.

The principle invoked by the plaintiff in error that neither party having title, the plaintiff having shown actual possession is entitled to recover, is applicable only when the plaintiff shows actual possession at the time of the intrusion. The Supreme Court of New Mexico, in the cases cited by the plaintiff in error, so applies the rule.

New Mexico, etc., Ry. Co. v. Crouch, 4 N. M. 293.

Deemer v. Falkner, Id. 149.

Bell v. Skillicorn, 6 N. M., 402.

This court so states the law. "In actions of eject-

ment, or trespass quare clausam fregit, possession by the plaintiff at the time of eviction has always been held prima facie evidence of the legal title, and as against a mere trespasser it is sufficient. 2 Greenl. Evid. Section 311."

Campbell v. Rankin, 99 U. S., 262.

This Court has so clearly and distinctly annunciated the principle applicable to this case and the reasons upon which it rests, that we content ourselves with quoting from its decision, in Sabariego vs. Maverick, 124 U. S., 297, as follows:

"The evidence must show a continuous possession, or at least that it was not abandoned, to entitle a plaintiff to recover merely by virtue of such possession.' That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass.

"This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive *possession*. If the lands, when entered upon by the *defendant*, were apparently vacant and acctually *unoccupied*, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his *actual possession* was not abandoned; otherwise he cannot be said to have had even a constructive possession."

Sabariego v. Maverick, 124 U. S., 297-8.

It was upon this principle, as enunciated in this case, that the trial court instructed the jury to find for the defendants. The plaintiff had not shown that he had not abandoned the naked possession held by him, but on the contrary by his own evidence clearly showed that his possession had not been continuously maintained up to the time that the Washington locators entered. If the case had been submitted to the jury, on the theory that neither party had title under the mining laws, and a verdict had been rendered in favor of the plaintiff, the Court would have been compelled to set it aside. In such a case, under the decisions of this Court, it is the duty of the Court to take the case from the jury.

X.

There was no relation of co-tenancy between Pilkey and the locators of the Washington under any view that can be taken of the case. If Pilkey surrendered the possession of the claim to the locators of the Washington, and they made a hostile location of it, that possession was adverse to the plaintiff. If they had agreed to let Pilkey have an interest in the Washington location, it was an open repudiation of any co-tenancy. In fact Pilkey repudiated it to both plaintiff and Ben Johnson about October 5th. (Record 145-6-7.) A relocation of a mining claim can not be treated as the acquirement of an outstanding title. The Sampson location was at an end, or no valid location of the Washington could be made. Whenever the old location ends,

the relation of co-tenancy ceases. The moment that the ground becomes subject to relocation for forfeiture, the relation of co-tenancy created by the forfeited location must end. This Court has clearly held that where an outstanding title is acquired by one partner in a mining claim, such purchase does not enure to the benefit of his co-partners.

Bissell vs. Foss, 114 U. S., 260.

The statute contains this provision: "And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location had ever been made." Revised Statutes of U. S., Sec. 2324. See also,

Strang vs. Ryan, 46 Cal., 33.
Dougherty vs. Morris, 11 Colo., 12.
Sanders vs. Mackey, 5 Montana, 523.
Hunt vs. Paldino, 33 Fed. Rep., 816.

There can be no question that the possession of a co-tenant in a mining claim can become hostile to his co-tenants, whenever he openly repudiates the relation, and gives notice to his co-tenants of such repudiation, notifies them that he is no longer holding for them, and this Pilkey did.

Freeman on Co-tenancy and Partition, Sec. 229.

The bringing of this suit admits that there was an ouster, otherwise ejectment could not be maintained.

Barnitz's Lessee vs. Casey, 7 Cranch, 471.

The evidence clearly shows that neither Pilkey or any other person had such prior possession as would sustain an action of ejectment.

Sabriego vs. Maverick, 124 U. S., 297, quoted supra.

There is no ground for the contention that Pilkey's possession was or could have been the plaintiff's after the repudiation of the contract, which all the evidence shows was before the entry of defendants. A prospecting contract can be rescinded or abandoned, and thereafter, all privity under it ceases.

Chadbourne vs. Davis, 9 Colo., 581.

In the action of ejectment under the New Mexico statute the plaintiff cannot recover on an equitable title, but only on the legal title, or actual prior possession of which he has been deprived by a defendant without title.

All evidence of fraud was therefore immaterial. The New Mexico statute of ejectment was enacted in 1847, and was re-enacted in the subsequent revisions of the laws of the Territory. Compiled Laws of N. M. (1865) 228; Compiled Laws of (1897) 3160, 3162, 3163 to 3168. It was taken, like all the early statutes enacted in New Mexico, from the statutes of Missouri. See statutes of Missouri (1845), page 232, Secs. 4 to 10 inclusive. These are the identical sections of the revised statutes of New Mexico above cited.

See page 41, supra.

These provisions have ever since been retained in Missouri. Revised Statutes of Missouri (1879), Sec.

2243, et seq. Lertensdorfer vs. Webb., 20 How., 176.

The Supreme Court of Missouri has uniformly held under this statute that no recovery could be had on an equitable title, and that the rules of the common law were not changed by the statute.

Hunter vs. Hempbill, 6 Mo., 106.

Guerno vs. Jones, 6 Mo., 330.

"If there were any circumstances of fraud in the person obtaining the confirmation in his own name, which would affect him with a trust in favor of those interested in the title, the circumstances must be stated as a ground of relief, so that the title, which the government has passed to him, may be decreed to pass to those interested. The present action is simply an action of ejectment, founded upon the plaintiff's title." The Court sustains a demurrer to the petition upon the ground that recovery in ejectment could not be had except upon the legal title.

Guyol vs. Chouteau, 19 Mo., 546.

In another case that Court held that in an action of ejectment relief upon the ground of mistake could not be had, and possession be recovered.

Williams vs. Carpenter, 35 Mo., 70.

"The defendant then held the premises under a legal title with actual possession; and before a plaintiff can recover in ejectment, he must show both a legal interest and a possessory title. R. C. 1855; 2 Greenleaf Ev., Sec. 303; Adams on Ejectment, 33."

Beal vs. Harmon, 38 Mo., 439. See also

Pickett vs. Jones, 63 Mo., 200.

"While it is true that legal and equitable rights can, in many states, be adjudicated in the same forum and in one action, it by no means results that the distinction in pleading and in the nature of the relief af-

forded have been abrogated."

Sedgwick and Wait on Trial of Title to Land, Sec. 184.

In the case at bar no equitable relief was asked, no issue of fraud is raised. The only right asserted was the legal right to the possession. This would of itself preclude the admissibility of any evidence of fraud, and any recovery on that ground. If plaintiff had been ousted of the possession, if defendants had wrongfully intruded upon his possession, how could evidence of a previous agreement or combination to do so, add anything to the fact that he had been so ousted, and deprived of the possession?

"A party who has a right of entry upon lands, and who has entered by force or fraud, can not be turned out of possession by the action of ejectment. If he possesses the right of entry, it is not impaired by any fraud, false representation or collusion practiced by him upon one having no right of possession, and so, if he is rightfully in possession he will not be put out of possession, though he may have gained an entry by any species of collusion. The wrongful entry and the wrongful withholding of the premises is, in ejectment nothing more than the entry upon the possession of the plaintiff, and the withholding the possession from him, without lawful right so to do. They are not made, in a legal sense, any more wrongful, in an action of ejectment, by superadding to them fraud or collusion. If the defendant has no right to the possession, as against the plaintiff, the plaintiff's cause of action is not, in the least degree, strengthened by proof of the fraudulent acts of the defendant in acquiring the possession. He may safely rest upon proof of his legal title to the possession, and the fraud or collusion of the defendant is immaterial."

Depuy vs. Williams, 26 Cal., 314.

This decision was rendered in ejectment for a mining claim, and the defense was that the plaintiffs had abandoned it by failure to work it according to the mining laws. The plaintiffs attempted to show defendants got possession of the mining claim by collusion with one of the co-owners. The plaintiffs were nonsuited.

This Court has repeatedly held that ejectment can only be sustained on the legal title or its equivalent "In actions of ejectment in the United States Courts, the strict legal title prevails. If there are equities which show the right in another, these cases can only be considered on the equity side of the Federal Courts."

> Foster vs. Mora, 98 U. S., 428. To the same effect, see
> Johnson vs. Christian, 128 U. S., 382, citing
> Bagnale vs. Broderick, 13 Peters, 436-450.
> Hooper vs. Scheiner, 23 How., 235.
> Foster vs. Mora, 98 U. S., 425.
> Langston vs. Sherwood, 124 U. S., 74-85.
> Moorehouse vs. Phelps, 21 How., 294.

"But in the action of ejectment, in the Federal Courts, the legal title must control, and to another forum the plaintiff must look for the enforcement of any equitable rights he may possess."

> Oaksmith's Lessee vs. Johnson, 92 U. S., 346. See also,
> Carpenter vs. Montgomery, 13 Wall., 480.

If the land was subject to mining location, there can be no question that the evidence was inadmissible. A valid mining location is property in the highest sense of the word. It is equivalent to a grant.

Belk vs. Meagher, 104 U. S., 279.
Forbes vs. Gracy, 94 U. S., 762.
Gwillim vs. Donnellan, 115 U. S., 45.

XI.

Conceding that the mining laws did not apply, nevertheless, the trial court was justified in instructing the jury to find for the defendants.

The evidence shows clearly an abandonment of the possession, slight as it was, which Pilkey took in July. It shows that Pilkey notified plaintiff that it was abandoned, and plaintiff himself participated in the abandonment by failing to file his location notice for record when he thought the claim to be on unclaimed public land. A mining claim and location have thus been defined: "A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. It usually consists in placing upon the ground in a conspicuous position a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local customs, or since the statute of 1872 according to the provisions of that act."

Smelting Co. vs. Kemp, 104 U. S., 636, 649.

Under the evidence in this case, the parties were endeavoring to make a location of a mining claim by compliance with the requirements of the statute, knowing full well what those requirements were,

and deliberately failed to comply with them. The trial Court, therefore, correctly held that the evidence that one of the locators had colluded with the subsequent locators to affect the abandonment of the location was immaterial when by the admissions of both of his co-locators they knew the necessary steps to perfect it had not been taken, and were themselves parties to the failure to take some of them. The Court further correctly proceeded upon the theory that an abandonment may be so clearly shown by the evidence that it would be error to submit the question to the jury. We therefore, insist that the Court was right under either the theory of abandonment or forfeiture.

Failure to do the work, properly monument the claim, or file the notice of location, under such circumstances—believing that the mining laws applied and knowing what they required, even if these laws did not apply, would amount to abandonment.

Ferris vs. Coover, 10 Cal., 631.
St. John vs. Kidd, 26 Cal., 272.
Davis vs. Butler, (6 Cal.) 1 Morrison Min. Rep., 7.
Derry vs. Rosse, (5 Col.) 1 Mor. Min. Rep., 5.
Mallett vs. U. S. Co., Id. 29.
Depuy vs. Williams, 5 Mor. Min. Rep., 251.
Strang vs. Ryan, (4 Cal., 33) 1 Mor. Min. Rep., 48.

The right of a discoverer of mineral on public lands is that of one in lawful possession merely until he has

perfected the location, and when a party fails to perfect his location, abandonment takes place under common law principles independent of any mining rule or regulation, and the ground becomes once more public domain and open to the occupation of the next comer.

St. John vs. Kidd., 26 Cal., 272.

"Inference of abandonment may arise from a single act as well as from a series of acts continued through a long space of time. It is a fact to be determined from the particular circumstances of the case."

Davis vs. Butler, 1 Mor. Min. Rep., 7.

Derry vs. Ross, (5 Colo.) 295. 1 Mor. Min. Rep., 5.

Mallett vs. U. S. Co., Id. 29.

Prior discovery and possession is not sufficient title to sustain ejectment where the discoverer fails to comply with the law and perfect his location, and the land becomes subject to re-location.

Defendants in error submit that the relationship which existed between Pilkey, Ben Johnson and plaintiff in error was that of "co-tenants" and not partners. The trust relationship between partners does not exist between co-tenants in mining claims.

Tuck vs. Downing, 76 Ill.) 71. 7 Mor. Min. Rep., 83.

Bissell vs. Foss, 114 U. S., 252.

There is no evidence in this case upon which to base any such proposition as set forth in plaintiff in error's brief that the putting of Fagaly in possession and denial by Pilkey of plaintiff's rights between the

expiration of the three months after the first location, and the location of the Washington, constituted an actual ouster of plaintiff. The evidence shows that said claim was re-located on the 23rd day of October, 1893, thirteen days after the expiration of the 90 days from the date of the location of said Sampson mine, and Fagaly's presence in the neighborhood of the claim, or even upon the claim for the purpose of making a location after the expiration of the three months would be wholly immaterial.

The allegations of fraud and collusion between Pilkey and the locators of the Washington mine, add nothing to plaintiff in error's right to maintain his ejectment suit, and was not a question which should have been submitted to the jury, or that could have been litigated in an ejectment suit.

Morehouse vs. Phelps, 21 How., 294.
Oaksmith vs. Johnson, 92 U. S., 343.
Carpenter vs. Montgomery, 13 Wall., 480.

Abandonment may be shown under the general issue. "The instant an abandonment takes place, a vacancy in the possession occurs. The right of possession of the former occupant is absolutely lost, and the land becomes public juris and free to the occupation of the next comer. * * * It does not appear that the boundaries of the claim were designated by any visible monuments or marks upon the ground, other than the treee upon which the notice was posted. It is evident that an actual possession of the entire three thousand feet described in the complaint can not be successfully claimed by virtue of the location, nor does it appear from the findings that the plaintiff had that constructive possession

which arises from a location made in accordance with the customs or regulations of miners."

Morenhaut vs. Wilson, 52 Cal., 263.

"We have held that an abandonment of mining claims by a plaintiff may be shown by the defendant under the general issue. Willson vs. Cleveland, 30 Cal., 200."

The case at bar is a much plainer case of abandonment, because no monuments were put up, no work done, no notice recorded. In accordance with the view of this Court, the failure to mark the boundaries, the plaintiff never had any actual possession, upon which defendants intruded—neither did he have constructive possession under compliance with the mining laws. The burden of proving either one or the other was upon the plaintiff.

Sabriego vs. Maverick, Supra.

The excluded evidence would not have helped his case in these particulars. The trial Court was therefore right in peremptorily instructing the jury. The first opinion rendered in the Territorial Supreme Court, (Record 267) 9 New Mex. Rep., 263, proceeds upon the theory that abandonment being a question of intention, must always be left to the jury. This is itself unsound. The evidence may be so clear the circumstances so convincing, that a mere declaration of the absence of an intention to abandon would not be sufficient to sustain a verdict of a jury, and the Court would be compelled to set aside the verdict. It would amount to no more than a scintilla of evidence.. In such a case the Court should not submit the case to a jury.

Randall vs. Baltimore & Ohio Ry. Co., 109 U. S., 482.

Goodlet vs. L. & N. Ry. Co., 122 U. S., 391.

"It would be an idle proceeding," this Court said in North Penn. Railroad vs. Commercial Bank, 123 U. S., 733, "to submit the evidence to the jury when they could just find only in one way."

Delaware & C. Ry. Co. vs. Converse, 139 U. S., 469, and also the cases cited there.

The statement of thecase in 52 Cal. is the correct one. It was incumbent upon the plaintiff to prove affirmatively that his actual, visible possession of the property, by such acts as are usually done for the purpose of perfecting and holding a mining claim up to the time his possession was disturbed, and not having shown this he was not entitled to recover.

Sabriego vs. Maverick, 124 U. S., 261.

XII.

The excluded evidence was also inadmissible for other reasons. The testimony of Neeland is as to a conversation with Fagaly in September, which does not amount to anything. (Record, page 126.) The other conversations were after October 23rd, when a car load of ore had been shipped. The cross examination shows that in the first conversation no conspiracy was mentioned. The second was about the latter part of September. The third, five or six weeks after the second. The conversaton with Walker long after the mine was located and the rights of the parties fixed. (Record, 129, 130, 131.)

Mrs. Metz offered to testify to statements made in

the latter part of June or first of July, 1893, to the effect that Pilkey said he had located the Sampson and Columbus for plaintiff and Ben Johnson. This was before the Sampson had been located. She offers to testify to conversations in September and October, but what she said was rather in the nature of conclusions than the statements of the parties. (Record 132, 135, 136.) They are in themselves immaterial. The Court permited her to testify that Pilkey said, between the 10th of July and 10th of October, that he was in possession for plaintiff. She could not fix the dates of any of the conversations, and stated that they were between June and July. (Record 139.)

H. B. Fergusson offered to testify, as stated on pages 6, 7 and 8 of plaintiff's brief. (Record, pages 111 and 112.) He also testified with reference to these conversations, as follows:

"Q. Can you fix the date of these conversations approximately?

A. Yes, sir; I think I can. The suit I believe, was filed—

The Court: What suit?

A. The first suit we brought for Lockhart after he employed us to contend for the Sampson location; in May, 1894, I think.

The Court: The papers in the case will show. You can state when with reference to that date, when it was.

A. These conversations began with reference to these disclosures he made in regard to the Washington claim—

Counsel for Plaintiff: It is a fact as shown by the bill that the first equity suit was filed May 26th, 1894.

A. The first conversations occurred subsequent to the filing of that suit and they extended substantially

up to the time of his death in various conversations. He told me once, after he had made most of the disclosures, that I could buy a fifth interest; that was on the street at Frank Sturgess' corner; I was passing there and he stopped me and said if I wanted to he could get me a fifth interest in the Washington location for $1,000.00.

Counsel for Defendant: Whose fifth interest?

A. I asked him that question, whose fifth interest it would be; he said Pilkey's; that Pilkey was in debt and was bound to sell out—"

Witness states that these conversations were prior to the time Fagaly conveyed his interest to the defendant Dunlap, and after May, 1894. (Record 115.) On cross examination the witness testified that the law firm of which he was a member were the attorneys for Frank Fagaly; that Wills, one of the original defendants in this suit, had brought a suit against Fagaly, claiming one-twentieth of Fagaly's fifth interest in the Washington claim—this suit was then pending; that the plaintiff wanted to employ the firm to bring this suit; that before the witness agreed to accept the employment, and bring the suit, the plaintiff executed a deed, conveying one fifth interest in the Sampson location and placed it in escrow with the witness to be delivered to Fagaly, when this litigation against Wills and his co-defendants in this case was finally concluded in favor of the plaintiff. All of these conversations were after the suits were filed. The first suit brought by plaintiff was a chancery suit to recover the same property involved in the present action, and the conversations were after that suit was filed. The Wills suit is in the Record, page 73. The deed was dated March 30, and ac-

knowledged May 25, 1894, and delivered the day before plaintiff's chancery suit was filed. The deed was to be delivered when the litigation was finally and successfully concluded. (Record 115, 116 and 117.) In answer to a question as to the delivery of the deed, witness testified as follows:

"The Court: You mean successfully concluded?

A. Yes, sir; otherwise there would be no use to deliver it.

Q. If not successfully concluded, not otherwise to be delivered?

A. It would not be worth much if not successfully concluded. In the second place Mr. Lockhart told me he was willing for me to deliver it, I might deliver it, provided Fagaly had in the litigation told all that he had some reason to believe were the inside facts as to the manner the arrangement was alleged.

Q. In other words, if Fagaly testified the way you and Mr. Lockhart thought the facts to be you might deliver the deed; otherwise not?

A. There was no talk between Lockhart and me as to what we expected Fagaly would tell, except in a general way Mr. Lockhart expressed a conviction that he had been swindled and robbed and believed if Fagaly would open up we would win the suit.

Q. The understanding was when you were talking to Fagaly you were Fagaly's attorney; Fagaly so understood?

A. We were as a matter of fact, and I guess he understood it, and I did too—Fagaly's attorney in the litigation as to the twentieth ownership under the Washington location, the twentieth interest.

Q. Did Fagaly ever authorize you to testify as to the statements he made to you under any circumstances?

A. No, sir; Mr. Fagaly died suddenly, unexpectedly to me, and up to the time I heard he was

dead I had no doubt he would take the stand and tell this himself, so I could not anticipate telling it.

Q. It was never expected you would testify to it, but you expected Fagaly would testify to it if he had lived?

A. Yes, sir.

Q. Then I would like to ask you, did Fagaly come to you before his death in company with Samuel Dunlap and demand that deed?

A. Yes, sir—no he didn't come and demand the delivery of the deed; that is, Fagaly came in company with Dunlap and stated to me he had sold his interest in the Washington and Sampson to Mr. Dunlap, that he had made him a deed to his interest in the Washington and that he wanted the deed which I held to be delivered to him in the future, delivered, when it was delivered, to Mr. Dunlap; that was the request.

Q. Was there any contemplation or understanding as to what should be done with that deed in case Fagaly died?

A. No, sir.

Q. Why is not that deed subject to delivery after Fagaly's death as you understand the matter, to Dunlap?

Counsel for plaintiff objects to question as calling for the legal opinion or conclusion of the witness which the Court would have to draw.

Counsel for defendant: I ask the question in order to base my argument to the Court.

A. Well, in the first place the deed was to be delivered when this litigation was successfully terminated in behalf of Lockhart; in the second place it was to be delivered in case Fagaly took the stand and testified in person to what he told me were the facts. He never did take the stand and testify, and I presume that is a sufficient answer to the question; and when he died I will state—(interrupted by next question by the court.)

The Court: Let me ask you this: As I under-

stand you, Mr. Lockhart delivered you this deed to be delivered to Fagaly, not if he stated the facts on the stand he had related to you, but if he opened up the matter?

A. Yes, sir.

The Court: Because no revelations had been made by Fagaly to you at the time Lockhart gave you that deed?

A. No, sir; nor for several weeks afterwards.

Q. You hadn't talked to Fagaly when Lockhart gave you this deed?

A. No, sir; Fagaly didn't know I had this deed for some weeks afterwards.

Q. Did you tell him you had the deed when you had your talk with him when he told you these facts?

A. Yes, sir; I told him I had the deed soon after the suit was brought, because he came and asked me about bringing the suit against him in the Sampson-Washington case, the present suit.

Q. He understood you were about to bring a suit against him on that account?

A. He understood we had brought it because the subpoena had been served on him.

Q. And then you told him you had that deed?

A. Yes, sir; that I hadn't brought it until I could protect him.

Q. You told him you would deliver the deed if he told the facts?

A. I believe he had already said he expected to open up and tell all; that was simply an afterthought that I let him know the deed was there and know he was in an impartial position.

Q. Look at that affidavit; is that your affidavit?

A. Yes, sir.

Q. Does not that state that the deed was placed in your hands of affiant, in escrow, to be delivered by you to Fagaly upon and on the promise of the performance of certain conditions by said Fagaly; now what conditions?

A. Is the word promise there?

Q. Yes, sir.

A. It ought not to be if it is—(witness looks at said affidavit). Well, that ought not to be in there if it reads that way. This is all I have to say about that. It is a fact that in my own mind I determined not to tell Mr. Fagaly and to do no more towards inducing him to testify than to show him that he was in an impartial position by showing him the deed, and I never did tell him that the deed was to be delivered on his testifying to anything.

Q. You say then when you made that affidavit you made a mistake in putting that pord promise there?

A. It is a mistake.

Q. Then you should no have put that word "promise" there?

A. It is a mistake; if it implies that I had told Fagaly before he made these disclosures to me he was to do so before he got his deed, then it is clearly and unequivocally a mistake.

Q. You got, Mr. Fergusson, a deed to a fifth interest of the two extensions, North and South extensions of the Washington?

(No answer to this question, the Court interposing a question to witness about the same time and diverting the attention of the witness to his question.)

The Court: What conditions, if at all, Fagaly was to perform?

A. There was no condition named to him he was to perform.

Judge Warren (counsel for plaintiff): Except in regard to the conclusion of the litigation?

A. The litigation was expected to be concluded—yes, he was told this deed was to be delivered to him when the litigation was over, nothing more.

Q. Didn't you get a deed from Fagaly to his fifth interest in the North Star and Sunny South as your fee for representing him in this litigation?

Objection by counsel for plaintiff, but witness an-

swers at same time.

A. No, sir; I will state in connection with that that Mr. Fagaly had a money consideration to pay in his Wills matter, and after paying a part of it, I think there was a balance of $100.00—either $50.00 or $100.00 due for the fee in the litigation between Wills and Fagaly about the 20th interest, and that I bought the fifth interest first personally, from Fagaly for the balance of this fee and I think $100.00 which I paid him in cash. Subsequently, at Judge Warren's suggestion, I deeded him half of what I had obtained from Fagaly in the North Star and Sunny South—the north and south extensions of the Washington."

(Record, pages 118, 119 and 120.)

The declarations of Fagaly and Walker are offered upon the theory that there was a conspiracy between them and Pilkey to defraud the plaintiff and Ben Johnson out of the Sampson claim. There was no foundation for the admissibility of these declarations, by proof of the conspiracy aliunde. Most of them were said to have been made long after the conspiracy, if any, had ended. The Washington had been located and some of the claimants were fighting among themselves over it. None of the declarations appear to have been made in furtherance of the conspiracy. The rule is thus stated:

"But here, as in other previous modifications of the rule before us, we must keep in mind the underlying distinction between admissions in furtherance of a conspiracy and admissions after its close. An admission of a co-conspirator, in any way coincident with and explanatory of a conspiracy, so far as concerns the subject matter of the declaration, is determined, is inadmissible. Thus, where the defendant was charged with conspiracy with T., and others to de-

fraud the revenue, it was shown by the prosecution that the defendant was a landing waiter, and T. an agent for importers at the custom house; it being their duty each to make entries of the contents of cases imported, so as to check the other. On thirteen occasions they made false entries, entering packages at less than their real bulk. T's check book was offered by the prosecution, for the purpose of showing by the counter foil that the defendant received from him part of the money of which the government had been defrauded by their operations; but this was rejected by the Court, on the ground that the statement was made after the plot was consummated, and related only to the distributing of plunder. Of course it was understood that, to entitle the declarations of the co-conspirator to admission the conspiracy must be first proved aliunde."

2 Wharton on Evidence, Section 1206.

There never was any proof of any conspiracy aliunde the declarations of the alleged conspirators offered in evidence by plaintiff in error.

"To make such admissions or declarations competent evidence, it must stand as a fact in the cause, admitted or proved that the assignor and assignees (the conspirators) were in a conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfillment, are competent against either of them. The principle of its admissibility assumes that fact.

"It necessarily follows that those declarations or admissions cannot be received to prove the fact itself. This is quite plain. A species or form of evidence which is in its nature inadmissible, unless some prior or other fact is proved, cannot be received to establish the fact, proof of which is an indispensable condition of its own admissibility."

Cuyler vs. McCartney, 40 N. Y., 228.

The admissions of part owners or tenants in common are not admissible against each other.

2nd Wharton's Ev. sec. 1199; note 3, citing Dun vs. Brown, 4 Cowen, 483, where the point is expressly decided and the authorities reviewed.

The question of admission in disparagement of title is fully treated in 2nd Wharton on Evidence, secs. 1156 to 1170, and from which we deduce, first, such declarations must have been made when the declarant was in possession; second, such declarations must not conflict with record title; third, they must have been made before declarant parted with his title; fourth, they must be self-disserving or knowingly against interest.

XIII.

The evidence of the witness Ferguson was clearly inadmissible on the ground that it was a communication between attorney and client.

The witness knew that he could not accept conflicting employment. He had already accepted employment from Fagaly, to protect his interest in the Washington to the extent of one-twentieth of the claim, as against Wills. This suit of Wills was based solely on the Washington location. To protect his client Fagaly against the suit which he brought for the plaintiff, he took the deed from plaintiff to Fagaly. Under these circumstances the communications from Fagaly were made to the witness. Fagaly conveys his interest in the Washington to Dunlap, who is a defendant in this action. Fagaly died without consenting to have the witness testify to his declar-

ation, even if he could consent after having conveyed the interest to be thereby affected to Dunlap. The statement of the proposition would seem sufficient without the citation of authority. "An attorney may not represent adverse interests or undertake the discharge of inconsistent duties; after having been retained by one party he cannot without a plain violation of his professional duty attempt to represent any party or interests which are opposed to his client, or receive any compensation from either party."

3 Am. & Eng. Enc. of Law, 295.

He was charged with the protection of Fagaly's interest, and was his attorney of record when the declarations were made to him—first, to defeat Wills; second, to see that Fagaly was protected against Lockhart's suit. He was also Lockhart's attorney. The fact that he held the deed, did not modify the situation, it rather aggravated it. Fagaly might for many reasons, which suggest themselves, have concluded not to testify to what witness and Lockhart might have thought entitled him to the deed. Even if he did, he was not to receive the deed unless the litigation terminated in Lockhart's favor.

"All communications made by a client to his counsel for the purpose of obtaining professional advice or assistance are privileged."

"The general rule is not disputed that confidential communications between client and attorney, are not to be revealed at any time. The privilege indeed is not that of the attorney, but of the client, and it is indispensable for the purpose of private justice whenever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish to dis-

close, and the law holds their testimony incompetent."

Chirac vs. Reinecker, 11 Wheaton, 294.

They need not relate to litigation.

Bacon vs. Frisbie, 80 N. Y., 394.

In this case, the Court say:

"This is in the nature of that which excludes evidence, when the production of it would be prejudicial to the public interests. The public good in the concealment of it overbalances that which may be reached, either by the public in the administration of criminal law, or by private persons in the inquiry into their rights."

"It is not essential that the communication should be made under special injunction of secrecy, or that the client should understand the extent of the privilege, but it may be with a view to professional employment, or for the purpose of obtaining professional assistance, advice or aid. It will fall within the privilege and cannot be disclosed by counsel."

McClellan vs. Longfellow, 32 Me., 494.

It makes no difference as to whether the client is a party to a suit before the Court or not. The importance of the communication to the client is not the test. It is the character of the communication.

Aiken vs. Kilburne, 27 Me. 252.

The privilege is that of the client and not of the attorney; and continues forever, unless waived by the client, and such waiver must be definite and unconditional.

Bacon vs. Frisbie, 80 N. Y., 394.

Tate vs. Tate, 75 Va., 522.

It is not extinguished by agreement or compro-

mise.

Hughes vs. Garnous, 6 Beaven, 352.
~~Turney vs. Bailey, 34 Beav., 105.~~ See also
Parker vs. Carter, 4 Munford, 273. (6 Am. Dec., 513.)
Betzhoover vs. Blackstock, 3 Watts, 20; 27 Am. Dec., 330.

The communication cannot be disclosed at any future time, nor given in evidence in another suit, although the client from whom the communications came is no party and has no interest in it.

Foster vs. Hall, 12 Pick., 89, citing
Rex vs. Withers, 2 Camb., 278.

This last case is a full discussion of the whole subject by Chief Justice Shaw. Further citation of authority on this proposition is certainly unnecessary.

We desire to say in this connection, that in raising the question as to the admissibility of the evidence of the witness Fergusson, upon the ground that it was a privileged communication, we do not question or intend to reflect in any manner upon his good faith in offering to testify. The question as to the admissibility was submitted to the Court in the absence of the jury, and we contend that the Court properly excluded it. In the case of Foster vs. Hall, supra, the Court say:

"In respect to the next question, the Court are of opinion that the testimony of Mr. Robinson was rightly rejected. Mr. Robinson very properly submitted it to the Court to detemine, upon the facts disclosed, whether he should answer or not, having no wish either to volunteer or to withhold his tes-

timony."

We respectfully submit that upon this record in this case, the judgment of the Supreme Court of New Mexico in affirming that of the District Court was proper, and that the case should be affirmed in this Court.

All of which is respectfully submitted.

WM. B. CHILDERS,
Attorney for Defendants in Error.

No. 147.

17397

Office Supreme Court U. S.
FILED
MAR 20 1901
JAMES H. MCKENNEY,
Clerk.

Certified copy of Decision filed 147 on behalf of D. E

Department of the Interior.

Filed Mar. 20, 1901.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 19, 1901.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 11, inclusive, of Secretary's decision of August 11, 1900, and decision of this office of January 9, 1901, *in re* Henry Lockhart *v.* Fredirico J. Otero *et al.*, is a true and literal exemplification of said Secretary's decision and of the record of said office decision on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.]

BINGER HERMANN,
Commissioner of the General Land Office.

Vol. 27,495.—C. J. W.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 11, 1900.

HENRY LOCKHART
v.
FREDIRICO J. OTERO *et al.*
} Involving Washington Lode Mining Claim, Survey No. 1034.

The Commissioner of the General Land Office:

SIR: December 21, 1898, Fredirico J. Otero and others filed application for patent to the Washington Lode Mining Claim, Survey No. 1034, Santa Fé, New Mexico. Notice of said application was duly posted and published

for the period required by law, during which time an adverse claim was filed by Henry Lockhart, upon which suit was timely instituted. A motion to dismiss the adverse claim of Lockhart was considered by the local officers and denied June 14, 1899, and appeal was taken from said action.

September 20, 1899, your office made the following finding in reference thereto:

"I find by examining the record in the case that the "Washington Mine, Survey No. 1034, is situated within "the claimed limits of the Canada de Cochiti private "land grant, reported No. 135. The claimed limits of "this grant cover over 100,000 acres. The Court of "Private Land Claims, under the Act of March 3, 1891 "(26 Stat. 854), confirmed said grant to the extent of "about 5,000 acres. The land covered by the Washing-"ton Mine, mineral application No. 86, is outside of the "limits of the grant as confirmed by the Court, but it "appears that claimants under the grant have taken an "appeal from said decree of confirmation to the Supreme "Court of the United States, where the case is still pend-"ing undetermined."

Whereupon it was held that the application for patent must remain suspended, without further action, until the matter of the adjudication of the rights of the claimants under the Canada de Cochiti private land grant is finally disposed of, and that it was unnecessary to pass upon any of the other matters raised in the appeal.

The applicants for patent moved for review of said decision, calling attention to an error of fact in reference to the statement that the decree of the Court of Private Land Claims was pending on appeal before the Supreme Court of the United States, and asking that the case proceed to adjudication upon their motion to dismiss the adverse claim filed by Lockhart.

October 25, 1899, your office considered said motion and found that there had been a misapprehension of the facts in stating that the case involving the private land grant was still pending before the United States Supreme Court when the decision of September 20, 1899, was rendered, and the statement was recalled. Another reason, however, was assigned for still declining to consider the case as presented by the appeal from the action of the local officers. It was stated that until a survey of the grant as confirmed is made under the direction of your office, and approved by the Court, the lands outside the confirmed limits are to be treated as in reservation.

The applicants for patent have appealed from your office decision, alleging that it was error to hold that the land was in any manner reserved from disposal after the entry of final decree in the United States Court of Private Land Claims, pursuant to the decision of the United States Supreme Court in said cause (167 U. S. 529).

It is evident from the final decree of the United States Court of Private Land Claims, made in pursuance of the decision of the United States Supreme Court in said cause, above cited, that the lands in question are outside the confirmed limits of the Canada de Cochiti private land grant.

It is not only conceded that said Washington Lode Mining Claim is outside the confirmed limits of the Canada de Cochiti private land grant, but it appears to be in a different township to the one in which said grant as confirmed is situated, and at least six miles from the line of said grant as indicated by the final decree fixing its limits. It was therefore error upon the part of your office to hold said lands to be in reservation on account of said grant, and so much of your office decision as so holds is vacated. It is to be observed, however, that

your office suspended action on the application for patent without considering the grounds upon which appeal was taken from the action of the local officers in denying the motion of Otero *et al.* to dismiss the adverse claim of Lockhart. This leaves the motion to dismiss said adverse claim still pending on appeal, which it is deemed best to dispose of without further delay.

It appears that at the time of the filing of the adverse claim by Lockhart he had a suit involving the land in question pending on appeal in the Supreme Court of the United States undisposed of, which suit, it is alleged, involved the same cause of action presented in said adverse claim, and has since been decided by the Supreme Court of the United States against his claim and contention. This appears to be the main ground relied upon in the motion to dismiss the adverse claim before the register and receiver.

The adverse claim filed by Lockhart and the suit instituted thereon were filed and instituted under Section 2326 of the Revised Statutes, and said suit was pending and undisposed of at the time the local officers denied the motion of Otero *et al.* to dismiss said adverse claim, and so far as the record discloses said suit is still pending. The effect of the filing of the adverse claim and of the institution of the suit upon the same was to stay all further proceedings under the application for patent until the court in which said suit was pending settled or decided the controversy or the adverse should be waived. The motion to dismiss the adverse claim was therefore properly denied by the local officers, and said motion is hereby dismissed. The stay of proceedings will be operative until proper evidence of the disposal of said case is filed with the record.

The record is remanded to your office for appropriate

action, upon the conclusion of the suit upon the adverse claim aforesaid.

Very respectfully,

THOS. RYAN,
Acting Secretary.

"N"
C. C. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 9, 1901.

HENRY LOCKHART
v.
FREDIRICO J. OTERO *et al.*
} Quasi-Contest No. 1759. Involving Washington Lode Mining Claim.

Register and Receiver, Santa Fé, New Mexico:

SIRS: December 21, 1898, Fredirico J. Otero *et al.*, filed in your office Mineral Application No. 86, for the Washington Lode, Mineral Survey No. 1034. Notice of said application was duly given by publication and posting, and on February 28, 1899, Henry Lockhart, as claimant of the Sampson Lode, filed his adverse claim against said Mineral Application No. 86. In said adverse claim Lockhart made the usual allegations, setting forth his claim to the land embraced in said application, and in addition stating that said Washington Mine is within the exterior boundaries of a certain private land-grant called the Canada de Cochiti grant, claims for which grant were then pending and undisposed of in the courts of the United States. It was also stated that an action for the recovery of said mining claim was duly commenced by said Lockhart as plaintiff against the said applicants or their predecessors in interest as defendants, and that the same was then pending and undetermined, on appeal from

the judgment of the Supreme Court of New Mexico, in the Supreme Court of the United States.

Suit was commenced upon this adverse claim within the period fixed by the statute.

June 9, 1899, said Otero, in behalf of himself and co-claimants, filed in your office a motion to dismiss the adverse or protest filed by Lockhart, one of the grounds of the motion being that at the time of the filing of said adverse or protest a suit involving the possession of said mining claim was pending and undetermined, on appeal, in the Supreme Court of the United States, and that since the filing of said adverse by said Lockhart the said suit had been finally determined and disposed of adversely to said Lockhart, and that by reason thereof the foundation and basis of said adverse claim had been destroyed. By your decision of June 14, 1899, this motion was denied for the reason that the adverse claim filed appeared to be sufficient, and because suit thereon had been commenced in a court of competent jurisdiction. From this decision applicants appealed, and subsequently you transmitted a second appeal and other papers in the matter.

From the papers filed in the case it appeared that the suit pending in the Supreme Court of the United States at the time of the filing of the adverse herein had been finally disposed of in favor of the applicants for patent, and that judgment in the case pending before the District Court of the Territory was rendered in favor of said defendants, an appeal to the Supreme Court of the Territory being granted by the Court. The second application to purchase, from your rejection of which the second appeal was taken, was refused by you for the reason that the decision of the District Court of the Second Judicial District had not become final, and that the same was then pending upon the right of plaintiff to take an appeal.

By office letters of September 20, 1899, and October 25, 1899, this office declined to take any action upon the pending appeals, and suspended the case, for the reason that the land involved was within the claimed limits of the Canada de Cochiti private land grant, the official survey of the confirmed limits of which had not then been filed and approved by this office. No action was taken upon the matters involved in the appeals. An appeal was taken from said office decision to the Department, and under date of August 11, 1900, the Department held that it was error upon the part of this office to hold said lands to be in reservation on account of said grant, and so much of said office decision as so held was vacated. It was, however, held by the Department that the adverse claim filed by Lockhart and the suit instituted thereon were pending and undisposed of at the time that the local officers denied the motion of Otero *et al.* to dismiss said adverse claim and to accept and file their application to purchase, and that a stay of proceedings would be operative until proper evidence of the disposal of said case was filed with the record. By Departmental letter of November 10, 1900, the motion for review of said decision of August 11, 1900, was denied.

There has now been filed with the record a certificate from the clerk of the Supreme Court of the Territory of New Mexico, which shows that the adverse suit of Henry Lockhart *v.* Fredirico J. Otero *et al.*, on appeal from the District Court of Bernalillo County, New Mexico, was dismissed by said Court for the reason that the appellants had failed to perfect their appeal within the time prescribed by law.

It therefore appears that both suits involving the right of possession to the Washington Lode Mining Claim have been regularly disposed of by the courts in favor of the

applicants. This disposes of the matters in controversy between the parties on the appeal from your decision.

Under date of September 20, 1900, you forwarded to this office a protest by said Lockhart against said Mineral Application No. 86. The allegations of said protest are, that the survey on which said Mineral Application No. 86 was based was not made and the boundaries established by the United States Deputy Mineral Surveyor in accordance with the original and amended location notice of said Washington Mine, as alleged in the return of said survey, and that said claim was not made in conformity with the law, and the rules, regulations and decisions of the Land Department, in this, that the west boundary of said claim, as established under Mineral Survey No. 1034, and returned to the Surveyor-General's office by the Deputy Mineral Surveyor who executed this survey, is located at a distance of 360 feet from the center of the vein or lode within the boundaries of said Washington Claim, and therefore within the west side line of said claim 60 feet of ground more than the claimants of said claim are entitled to under the law.

The protest is corroborated by the affidavits of two other persons, and a diagram is attached to one of said affidavits which purports to show the discrepancy between the claim as located and as surveyed for patenting. The official field-notes of survey have been carefully examined, and it is there noted that lines were run from and to three of the stakes set when the last amended and additional location was made. One of the corners established by the survey is a new corner, but it appears from the official field-notes that said corner is well within the ground as originally located. It is not clear from said protest, taking into consideration the field-notes of survey on file, that more ground has been included within said

survey than is allowable under the statutes, nor that the claimants have taken ground other than that located by them. Several locations have been made of this claim since the original location, and it may be that in making their measurements the protestant and his witnesses have mistaken for corners on which the last location was based corners which belonged to some prior locations.

On the whole I do not think, giving the weight to the official field-notes to which they are entitled, that the protestant has made out an issue which calls for an investigation by this office.

The protest is accordingly dismissed.

Since the above was written there has been filed in this office, by resident counsel for the plaintiff, a copy of the "declaration," as extracted from the transcript of the record in the case of Henry Lockhart, Plaintiff in Error, *v.* J. A. Johnson, Julia Johnson, his wife, *et al.*, No. 147, October term, 1900, on file in the Supreme Court of the United States. This copy is certified by the Clerk of the Supreme Court of the United States, and from this it appears that there is now pending in said Court an action in ejectment involving said Washington Lode Mining Claim. From said copy, however, it appears that said suit was commenced in the District Court of the Second Judicial District of the Territory of New Mexico on the 21st of June, 1895, long prior to the filing of Mineral Application No. 86, by Fredirico J. Otero *et al.*, for the Washington Lode. Case No. 147 is a reinstatement of the suit formerly dismissed by the Court.

The pending suit, it would accordingly appear, is not one brought under the provisions of Section 2326, U. S. Revised Statutes, and for this reason, and the further reason that the adverse suit terminated in favor of the

applicants, this office will not further suspend action upon said mineral application because of the pending suit.

You will advise the parties hereof and in due time report.

Very respectfully,

BINGER HERMANN,
Commissioner.

17402